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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CURT A. SANDMAN, Plaintiff and Appellant, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Defendant and Respondent.	G032380 (Super. Ct. No. 01CC07331) O P I N I O N

Appeal from an order and judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Request for judicial notice. Motion to augment record on appeal. Request for judicial notice denied. Motion to augment record denied. Order and judgment affirmed.

Waldron & Olson, Gary A. Waldron and Sherry S. Bragg for Plaintiff and Appellant.

James E. Holst, John F. Lundberg and Christopher M. Patti for Defendant and Respondent.

* * *

The Regents of the University of California (defendant), by its Chancellor of the University of California at Irvine, denied the request of Curt A. Sandman (plaintiff) for an appointment to a lifetime tenured faculty position in the Department of Psychiatry and Human Behavior (the department). Plaintiff grieved the decision based on asserted procedural errors and a claim of discrimination. The hearing board found evidence of certain procedural errors, but no evidence of any form of discrimination. Plaintiff entered into a compromise agreement with defendant whereby there would be a second evaluation, based on the existing record, minus the procedural errors. The second evaluation, by a new chancellor, resulted in another denial of tenure. Plaintiff then filed a civil action alleging age discrimination, and a petition for writ of administrative mandate, seeking an order directing defendant to make the appointment.

The court denied the petition, finding no basis for overturning the decision and noting the second review process cured any defect in the earlier procedure. Further, the court found the no-discrimination finding conclusive because plaintiff did not succeed in setting it aside in the writ proceeding. For that reason, plaintiff was precluded from maintaining a civil action for damages for age discrimination, and defendant was awarded judgment on the complaint.

Plaintiff appeals the order denying the writ petition and the judgment. We affirm. We conclude the decision to deny plaintiff the position he sought was not arbitrary, capricious, or lacking in evidentiary support. Moreover, under *Johnson v. City of Loma Linda* (2000) 24 Cal. 4th 61, 76, having failed to obtain writ relief from the no-discrimination finding of the administrative agency, plaintiff cannot proceed with his civil suit. As a matter of law, defendant was entitled to judgment in its favor.

FACTS

University Administrative Processes

In general, a candidate who seeks appointment to a tenured position at the university must undergo a rigorous review under procedures set forth in defendant's Academic Personnel Manual (APM). Evaluations are solicited from experts in the academic field outside the university. The case then works it way up through evaluation by certain campus academic officials and bodies, including the candidate's department, the dean or provost of the relevant academic unit, an ad hoc committee made up of faculty of rank equal to that proposed for the candidate, the campus's standing Committee on Academic Personnel (CAP), the executive vice chancellor, and finally, the chancellor, who makes the ultimate decision. Although this process includes no formal hearing, the candidate has numerous opportunities to read and comment on the recommendations of the various reviewers as the application moves forward.

If an individual claims his or her faculty rights and privileges have been violated in the evaluation process outlined above, a grievance procedure is available. In cases involving "tenure, promotion, or reappointment, . . . grievances may be based only on allegations: (a) that the procedures were not in consonance with the applicable rules and requirements of the University or any of its Divisions, and/or (b) that the challenged decision was reached on the basis of impermissible criteria, including (but not limited to) race, sex, or political conviction."

A divisional committee on privileges and tenure (P&T) reviews the written grievance to determine if the allegations "would constitute a violation of the faculty member's rights and privileges." If so, P&T "may conduct a preliminary review of the evidence to determine whether there is sufficient reason to believe that a right or privilege of the grievant may have been violated." Where probable cause appears, P&T attempts to resolve the controversy and, if unsuccessful, turns the matter over to a hearing board

appointed by P&T. Prior to a formal hearing, the chair of the hearing board schedules a conference with the parties to determine, inter alia, undisputed facts and define the issues to be decided by the hearing board. In the formal hearing, the parties are allowed to be present and represented by counsel, and to present evidence and call and cross-examine witnesses. The grievant bears the burden of proving the validity of the grievance by a preponderance of the evidence.

Where the hearing board reviews a case involving tenure appointment, it is not permitted to "reevaluate the academic qualifications or professional competence of the grievant." Rather, it makes "findings of fact, conclusions supported by a statement of reasons based on the evidence, and [a] recommendation," which is forwarded to the parties, the chancellor, the chair of the divisional P&T, and the chair of the university P&T. The hearing board has authority to "reconsider a case if either party presents, within a reasonable time after the decision, newly discovered facts or circumstances that might significantly affect the previous decision and that were not reasonably discoverable at the time of the hearing."

As will be seen, in the case here, plaintiff underwent the full evaluation process, and then invoked the grievance procedure, in which the hearing board found some procedural errors, but no discrimination, had occurred in the evaluation. Rather than seeking reconsideration, plaintiff agreed with defendant to a compromise remedy of a second evaluation procedure on the basis of the existing record, minus the errors. In the reevaluation, the university's new chancellor ultimately reached the same conclusion as had the former chancellor and denied plaintiff the tenure faculty appointment.

Plaintiff's Tenure Application

There are nontenured (in-residence) and tenured (in-line) academic appointment series at the university, each series having progressively ranked steps of promotion. Although the formal criteria for appointment to professor in-residence and

professor in-line are the same,[1] there are significant differences in the positions. A professor in-line has a university budgeted appointment "continuous in tenure until terminated by retirement, demotion, or dismissal," and the latter two can be imposed only by vote of the University's Board of Regents. In contrast, in-residence faculty positions are self-funded[2] and do not enjoy the security of lifetime employment. In both series, promotion through the ranks from step I through step V is typically based on years of service, whereas advancement beyond step V is made only upon "evidence of highly distinguished scholarship, highly meritorious service, and evidence of excellent University teaching."

In July 1979, plaintiff joined the department faculty as a professor in-residence, step I. By July 1990, he had been promoted to professor in-residence, step V, the level at which he remained for the next five years. In 1995, when plaintiff was 54 years old, his department recommended he be appointed to professor in-line, at the step VI level.

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[1] In either category, the following applies: "A candidate for appointment or advancement in this [in-residence] series shall be judged by the same four criteria and standards of performance specified for the Professor [in-line] series: [¶] a. Teaching [¶] b. Research and creative work [¶] c. Professional competence and activity [¶] d. University and public service[.]" In addition to these criteria, however, appointment to the in-line series is made only if there is an appropriate budget provision and a competitive search.

[2] With certain exceptions, section 270-16-a of the APM limits the amount of state funds available for in-residence positions. It provides, "Fifty percent or more of the base salary of the [in-residence] appointee shall come from funds other than General (State) funds." Moreover, under section 270-18-a, "[a]ppointments to titles in [the in-residence] series may be made with or without salary." In general, in-residence professors must obtain research grants or find other sources to partially or fully fund their positions. Plaintiff had a good track record in this respect, having received a number of federally funded grants.

On August 10, 1995, CAP, stating it was "unable to judge either the quality of the research or the quality of the venues in which it is published," recommended an ad hoc review committee be formed to consider plaintiff's request "[f]or such a high level appointment." On September 22, 1995, the ad hoc committee, including two off-campus members, found plaintiff's "dossier, as prepared did not provide adequate documentation to warrant the proposed action and decided that it should be returned to the Department of Psychiatry for revision." The ad hoc committee gave plaintiff specific instructions on how the file should be supplemented, including a request that the department solicit "at least eight" new review letters from highly distinguished "outside scientists" who had not worked with plaintiff. The department responded to the request and, by the end of the year, had obtained and submitted the additional materials.

On March 19, 1996, after reviewing plaintiff's augmented dossier, the ad hoc committee issued its report raising concern that "not all of [plaintiff's] research is sufficiently meritorious." Consequently, the committee unanimously voted to deny plaintiff a promotion from step V to step VI, but voted three-to-one to recommend the proposed appointment to the in-line series. Apparently in response to this decision, plaintiff's department "changed its recommendation to a lateral move to in-line Professor, Step V."

On May 2, 1996, after separately reviewing the case, CAP reported its findings, identifying issues as follows: "A number of the listed contributions [by plaintiff] are abstracts, invited reviews, or letters to the editor, which make it difficult to easily assess the extent of his scientific productivity. Reviewers were concerned also that there is a lack of focus in the work and that the conclusions dealing with self injurious behavior may be based on a small number of patients. The need for reproducible double-blinded control studies was pointed out. Reviewers also noted inadequate documentation of significant honors as evidence of widespread national and international recognition. [Review letters] were generally supportive. However there was one notable exception

that suggested [plaintiff's] interpretations of basic neuropeptide pharmacology were speculations designed to evoke experimental validations from basic scientists to help support imaginative hypotheses by [plaintiff] on opioid peptide[3] involvement in autism."

CAP's report noted that, notwithstanding the ad hoc committee's recommendation of a change in series, "given the concerns expressed in this review, CAP could recommend neither a merit increase nor a change of series." The report further stated, "Reviewers concluded unanimously that although there were areas of strength, there appeared to be no compelling advantage to the University to recommend a change of series as a Line Professor, Step V or VI. [¶] All those [committee] reviewers voting recommended against the merit increase to Step VI, a level recommended only on evidence of highly distinguished scholarship, highly meritorious service, and evidence of excellent University teaching. In this case, these criteria were not met."

On June 4, 1996, William Bunney, chair of the department's P&T committee, wrote a letter to Lyman Porter, faculty assistant to Executive Vice Chancellor Sidney Golub, taking issue with some of the points raised in the CAP review. Bunney noted that certain misinformation reported by the ad hoc committee had been perpetuated in CAP's report, to wit, plaintiff's research did *not* lack double-blind studies and the sample size was incorrectly understated.

Two days later, Dennis Cunningham, Senior Associate Dean for Academic Affairs, sent Golub his recommendation that plaintiff's "dossier does not present

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[3] "Opioid" means "possessing some properties characteristic of opiate narcotics but not derived from opium." (Merriam-Webster's Collegiate Dict. (10th ed. 1999) p. 815.) "Peptide" refers to "any of various amides that are derived from two or more amino acids by combination of the amino group of one acid with the carboxyl group of another and are usu. obtained by partial hydrolysis of proteins." (*Id.* at p. 861.) The phrase "opioid peptide" is defined as "any of a group of endogenous neural polypeptides (as an endorphin or enkephalin) that bind esp. to opiate receptors and mimic some of the pharmacological properties of opiate drugs." (*Id.* at p. 815.)

sufficient evidence regarding the focus, impact or significance of [plaintiff's] research to warrant a promotion to Professor, Step VI."[4] Cunningham further concluded, "The recommended change in series to an in-line position seems unwarranted for a faculty member whose research record does not support advancement to Professor Step VI after six years at Step V."

CAP then re-reviewed the original dossier. On June 20, 1996, it reported it had "found no compelling reasons to reverse its earlier recommendation against [plaintiff's] change of series, appointment, and promotion." On September 3, 1996, Golub recommended that Chancellor Laurel Wilkening deny plaintiff's request for appointment to the in-line series, and on September 5, 1996, Wilkening did so. Plaintiff was informed of the chancellor's decision the following day.

Plaintiff's Grievance

More than a year later, in October 1997, plaintiff filed a grievance. On January 26, 1998, he was interviewed by a subcommittee of P&T as part of a prehearing evaluation. On October 29, 1998, after a preliminary investigation, P&T's then chair, Terence Parsons, informed plaintiff, "The committee met earlier this month, and approved the recommendation of the informal hearing team that there is probable cause that your rights may have been violated." The parties' attempts at informal resolution failed. Thus, on December 8, 1998, P&T notified plaintiff and Golub's replacement, Executive Vice Chancellor William Lillyman, that it would go forward with the formal hearing.

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[4] University rules require that any hire to an in-line faculty position result from a publicly advertised search process. Cunningham noted that "the search and advertisement" through which the department selected plaintiff appeared to have been skewed, in that they "seem [to have been] designed for the internal candidate referenced in the advertisement."

The hearing board considered plaintiff's claims beginning on April 23, 1999. Plaintiff asserted two bases of misconduct: (1) There were various procedural errors occurring in the review process, and (2) he had been the victim of discrimination.[5] On June 8, 1999, after plaintiff and Associate Executive Vice Chancellor Herbert Killackey had filed their closing statements, the hearing board issued its written report, stating in its introductory paragraph, "In its deliberations the board[] found evidence of some procedural errors in [plaintiff's] case. We found no evidence of any kind of discrimination in the case." The findings regarding procedural errors were: (1) A statement in the ad hoc committee's March 19, 1996 report could have been interpreted incorrectly to mean that plaintiff's research studies were not "double-blind," and that misimpression was not later corrected by the ad hoc committee. (2) The hearing board criticized the ad hoc committee's discussion of the sample sizes of plaintiff's studies, noting that a study relied on by the ad hoc committee had a smaller sample size than plaintiff's studies.

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[5] Apparently plaintiff advanced more than one discrimination theory. In the trial court, at closing argument, plaintiff's counsel said plaintiff's discrimination claim was "on the faculty staff handbook which has a provision in it that deals with how colleagues are to deal with one another within the university, and that it was considered to be unprofessional behavior of colleagues to utilize, what was the exact phrase, arbitrary or personal reasons in reaching their decisions. [¶] And so what [plaintiff] had a very real concern with, and it underlies the whole procedure, is that, frankly, somebody in the university had it in for him, and that someone was powerful and influential. [¶] Do we have evidence of that beyond what appears in the record? No. [¶] Is that the basis for this proceeding? No. [¶] But is that the basis upon which he was operating at the time in his mind set? Yes. [¶] It is quite clear from the record that he had that concern and he wanted that concern addressed, and what he understood the appropriate way to bring that concern to the privilege and tenure committee was on the claim of discrimination based on what is in the administrative procedure manual, section 15. [¶] It bars interpersonal discrimination based on arbitrary or personal reasons and identifie[s] it as types of unacceptable conduct between colleagues." Further details regarding the discrimination issue are set forth in the legal discussion, *post*.

However, the hearing board rejected plaintiff's other claims of error in the review of his case, as well as his contention that denial of his application resulted from age discrimination. It "saw no evidence of discrimination in the handling of this case. [Plaintiff's] main claim of discrimination is based on Professor Killackey's suggestion that the university may properly show more caution in assessing appointments for Professor in-line than for Professor in-residence, since an in-line appointment involves the university in a 15 to 20 year commitment. [Plaintiff] sees this as evidence of age discrimination. The board is unable to see any connection between this statement and age discrimination. [¶] In addition, the board rejected other claims that since some judgments were inaccurate this 'could only be interpreted to be discrimination.' [¶] Some members were troubled by the apparent misconstrual [*sic*] of sample sizes in the ad hoc committee, and were inclined to be sympathetic to the suspicion that [plaintiff] was not judged fairly at this point. But the file makes it impossible to verify anything about the motives of the members of the ad hoc committee."

The hearing board invited the parties to submit proposed recommendations for remedies "consonant with the finding above," and to engage in settlement discussions in that regard. On June 28, 1999, Killackey wrote to the hearing board, stating "[t]he proposed resolutions offered by [plaintiff, that he be given the appointment] are not acceptable. . . . I would also strongly encourage members of the Hearing Board to also offer its suggestion on how we would proceed." There followed several months of negotiations between plaintiff and the university administration regarding remedies.

On February 2, 2000, Parsons wrote to plaintiff and Killackey, stating that because it appeared negotiations had been unsuccessful, he would ask the hearing board to make a final recommendation as to the proper remedy. On March 8, 2000, after further input from the parties, the hearing board recommended "a new review, to be conducted as follows: [¶] The Executive Vice Chancellor will review the following: [¶] [Plaintiff's] 1996 dossier and record as it was originally submitted, [¶] [Plaintiff's]

opening and closing statements to the Formal Hearing Board of the Committee on Privilege and Tenure, [¶] Professor Killackey's closing statement to that board, [¶] The statement of findings of that board. [¶] After the Executive Vice Chancellor has reviewed the dossier together with the itemized additional materials ('the file'), he will forward the file and his recommendation to the Chancellor. The Chancellor will make a final decision. If the final decision is in favor of an appointment in the Professorial series, the effective date will be [retroactive to] July 1, 1999." The recommendation also provided, "This review should take place promptly upon [plaintiff's] unconditional written agreement that the review is to be conducted, provided that this agreement is submitted before the end of March, 2000." The hearing board specifically found that implementation of this remedy would correct the complaints raised in plaintiff's grievance, stating, "[I]t is our judgment that if this review is carried out, it will be an appropriate settlement of all the claims raised by [plaintiff] in his complaint filed with the Committee on Privilege and Tenure, including resolution of the issues as recommended in the report of the Formal Hearing Board of June 6, 1999." On March 20, 2000, plaintiff wrote to Parsons, "I am in agreement with the Board's final recommendation." Accordingly, the original decision on plaintiff's application was vacated and the new evaluation review was scheduled.

The Second Review

Pursuant to the agreement, the materials specified in the hearing board's recommendation were assembled, and plaintiff reviewed them for completeness. After reviewing the augmented file, Lillyman wrote to the new chancellor, Ralph Cicerone, recommending plaintiff not be awarded tenure. Lillyman noted, "[N]ot all aspects of [plaintiff's] research are sufficiently meritorious or particularly focused," and there was a "lack of adequate documentation of significant honors that would support the notion that [plaintiff's] work has received widespread national and international recognition." In

particular, Lillyman reiterated the written appointment and promotion standard applicable to tenure professorship: "Superior intellectual attainment, as evidenced both in teaching and in research or other creative achievement, is an indispensable qualification for appointment or promotion to tenure positions. Insistence upon this standard for holders of the professorship is necessary for maintenance of the quality of the University as an institution dedicated to the discovery and transmission of knowledge." Lillyman concluded, "I do not find the compelling evidence necessary to support an appointment to the Line series."

On June 14, 2000, five years after plaintiff's initial application, Cicerone issued his final decision, stating, "[A] new review of your case has been conducted in accordance with the conditions outline[d] in Professor Terence Parson's memo of March 8, 2000. . . . After taking into consideration the content of the review file, including all appendices and attachments, my decision is against your appointment to the Line series."

Litigation History

Plaintiff's complaint, filed in Orange County Superior Court on June 6, 2001, alleged a single cause of action against defendant for age discrimination under the Fair Employment and Housing Act (FEHA, Gov. Code, § 12900 et seq.) Defendant demurred, contending the civil complaint was barred by the finding of P&T that there had been "no discrimination." Plaintiff then filed his first amended complaint, adding to the discrimination claim a petition for writ of administrative mandamus.

At the heart of the pleading is the following allegation: "At the Formal Hearing, the University's representative, Herbert Killackey, who was employed by the University as the Associate Executive Vice Chancellor and was acting as the University's representative, informed the [hearing] board that the University used a different procedure for assessing Professor in Line positions (i.e., tenured positions) and Professor in Residence positions (which [plaintiff] already had) because the Professor in Line

appointment involves a 15- to 20-year commitment, with the clear inference that [plaintiff's] age of nearly 60 years at the time of the hearing affected the Committee's determination. Contrary to Killackey's representation, the University has explicitly stated in the Academic Personnel Manual that the requirements for Professor in Line are identical to the requirements for Professor in Residence. Nonetheless, Killackey stated at the hearing: [¶] 'When the University is hiring someone in Line, there is real consideration of what they are going to be contributing to the University in the next 15 or 20 years and that is different than the case in Residence. . . . We don't move people into steps and expect them to [remain] there. We expect there to be advancement in the system so that we are not hiring, someone gets hired at the level of Professor V, but it's not an expectation that they are going to be a Professor V for the remainder of their career. So there are evaluations and judgments that go on like that, that differentiate in-residence and in-line appointments that were relevant here.'"

When defendant again demurred to the discrimination claim on the same ground, plaintiff responded, "Plaintiff does not disagree that . . . the University's administrative finding must first be overturned by writ of mandate before the University's liability under the civil action can be considered." However, plaintiff asserted the petition and civil claim could be joined in the same action and proceed simultaneously. The court agreed and overruled defendant's demurrer.

In April and May 2002, the parties briefed the writ action, and on May 28, 2002, the court held a hearing on the writ petition. On April 4, 2003, the court entered an order and judgment denying the writ petition, stating, "The court finds that the second hearing/review process cured any defect which may have existed by way of lack of substantial evidence in the prior hearing. Consequently, the court finds no basis to overturn the administrative findings. [¶] . . . The determination of the administrative hearing being adverse to Plaintiff, it serves as a res judicata/collateral estoppel bar to his

civil action [for discrimination] and Defendant is, therefore, entitled to judgment on the entire action." Plaintiff appeals.

DISCUSSION

Standard of Review

Although in his brief plaintiff contended administrative mandate (Code of Civ. Proc., § 1094.5) was the appropriate vehicle for inquiring into the validity of the chancellor's adverse decision concluding the second review and evaluation procedure, he conceded at oral argument that ordinary mandate (Code of Civ. Proc., § 1085) applies. Defendant agrees and so do we.

"[J]udicial review via administrative mandate is available 'only if the decision[] resulted from a "proceeding in which *by law*: 1) *a hearing is required to be given*."'" (*Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 848.) On the other hand, "ordinary mandate is used to review adjudicatory actions or decisions when the agency was not required to hold an evidentiary hearing." (*Ibid.*) Here, as noted, *ante*, under the university's rules pertaining to academic review, evaluation of a proposed appointment to a tenure position involves a comprehensive series of reviews, but at no point in that process is an evidentiary hearing required by law. (See *McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, 1785-1786 [no legal requirement that tenure decision must result from an evidentiary hearing].)

Here, the matter before us is the legitimacy of Chancellor Cicerone's denial of the requested appointment. Our standard of review of the chancellor's denial of the appointment under section 1085 is established: We uphold the decision unless it was arbitrary, capricious, or lacking in evidentiary support. (*Bunnett v. Regents of University of California, supra,* 35 Cal.App.4th at p. 848.)

Denial of the Writ Petition

Plaintiff first claims defendant's denial of his request for tenure was arbitrary and capricious because "the University improperly undertook to conduct a comprehensive review of [plaintiff's] qualifications [for the in-line position]." According to plaintiff, "the criteria and standards for candidates seeking a transfer to the in-line series are exactly the same as those seeking appointment to the in-residence series." Plaintiff argues that because he had already met the qualifications for a professor in-residence position, he perforce had met the requirements for a professor in-line position, and was thus essentially entitled to an automatic upgrade to the in-line spot without further ado. Thus, defendant's careful evaluation of his qualifications violated its own rules and constituted arbitrary and capricious conduct.

This proposition is unsupported by cited authority, the record on appeal, or good old common sense. In regard to the record, section 220-85 of the APM provides that any appointment or promotion to a tenured position of associate or full professor must undergo a full academic review. Additionally, the rules require appointment of an ad hoc committee to carry out assigned duties regarding the tenure request, and section 270-16-e specifically states that transfer of in-residence faculty to other titles may be made only after "regular academic review." Finally, under section 210-1-d of the APM, when a tenured professorship is sought, "[s]uperior intellectual attainment, as evidenced both in teaching and in research or other creative achievement, is an indispensable qualification."

Defendant apparently interpreted its stated policy to require that plaintiff's tenure candidacy receive a full academic review and evaluation. "An agency's interpretation of regulations is of controlling weight unless inconsistent or plainly erroneous." (*Franklin v. Leland Stanford Junior University* (1985) 172 Cal.App.3d 322, 348.) Plaintiff has presented no evidence that defendant's interpretation here is either.

In regard to common sense, we query why the university would require that a comprehensive search be conducted to fill the position, if an in-residence faculty member already had the right to fill the slot? Surely such a search would be an exercise in futility. Moreover, the difference between the two categories seems self-evident: When the institution is dealing with a *lifetime* appointment, it is permitted to exercise scrutiny above and beyond that involved in a one to six year in-residence appointment. (See *Scharf v. Regents of University of California* (1991) 234 Cal.App.3d 1393, 1405 ["[T]he evaluation of scholarship and the grant or denial of tenure or promotion . . . is a defining act of singular importance to an academic institution"].) Finally, there is the well established pragmatic rule of judicial noninterference in highly subjective tenure decisions. As stated in *McGill v. Regents of University of California, supra,* 44 Cal.App.4th at page 1788, "Where the tenure file contains the conflicting views of specialized scholars, *triers of fact cannot hope to master the academic field sufficiently to review the merits of such views and resolve the differences of scholarly opinion*." (Italics added.)

Although many of his arguments attack defendant's academic judgment, plaintiff denies he is challenging the merits of the tenure decision. He insists he is simply contesting the review procedure on the grounds it "was conducted based upon erroneous facts which were never reconciled, and . . . delayed by the University and dragged out for over five years." Plaintiff further complains Cicerone's final decision did not adequately set forth its reasoning. We will discuss these contentions seriatim*, post*.

With respect to perpetuated misinformation, plaintiff asserts that the errors about double-blind studies and sample size, summarized *ante*, were not expurgated from the file, thus Cicerone "received and relied upon a summary recommendation [from Lillyman] that was based upon inaccurate and incomplete information which prevented [Cicerone] from making an informed decision." Plaintiff argues the "tainted record, by definition, could not and did not afford the University the opportunity to 'know, consider

and appraise' the true evidence." (See *LeStrange v. City of Berkeley* (1962) 210 Cal.App.2d 313, 325 ["Due process requires a fair trial before an impartial tribunal. Such a trial requires that the person or body who decides the case must know, consider and appraise the evidence"].)

What plaintiff fails to acknowledge is that the hearing board made an express finding that two potential errors had occurred in the ad hoc committee's report: (1) a statement that could have been interpreted to mean plaintiff had not conducted double-blind studies when, in fact, he had; and (2) a statement suggesting plaintiff's studies relied on a small sample size compared to those of other studies contradicting his results when, in fact, plaintiff's sample sizes were large by comparison. The hearing board concluded the problem could be remedied in the re-review by supplementing plaintiff's original file with the report *pointing out the errors*. Plaintiff did not ask that the materials be expurgated. He *agreed* to the proposed procedure, and it was followed. The record shows that the corrective materials were considered in the re-review. We will not presume Lillyman and Cicerone, in making their decision, secretly continued to rely on statements they had been informed were inaccurate. (See, e.g., *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817 [courts "must accord a '"strong presumption of . . . correctness"' to administrative findings"]; *Ishimatsu v. Regents of University of California* (1968) 266 Cal.App.2d 854, 864-865 ["all legitimate and reasonable inferences [must be] indulged in to uphold the [agency's decision] if possible"].)

As for the issue of delay, the record demonstrates some occurred in the grievance process, as to which plaintiff accepted the remedy of re-review. But there were no unreasonable delays in the academic re-review. Additionally, we note plaintiff himself delayed nearly a year in filing his grievance and another year before he filed the instant suit, and along the way, he requested and was granted a number of extensions of time to prepare documents relating to various components of the administrative proceedings. There is scant evidence plaintiff was in a hurry to bring things to a

conclusion. But in any event, delay alone is not an adequate ground for issuance of a writ: Plaintiff must make a showing of prejudice resulting from the delay. (See *Gates v. Department of Motor Vehicles* (1979) 94 Cal.App.3d 921, 925 ["petitioner has cited no cases, nor have we found any, which invalidate an administrative decision solely on the ground that there was a period of unreasonable delay during an agency investigation that preceded [agency action]"].) Plaintiff has not demonstrated how he was harmed by the delay.

Plaintiff complains Cicerone did not issue an adequate statement of reasons for the denial of tenure. We deem the point waived. Plaintiff did not request a statement of reasons under defendant's procedure, set forth at section 220-80-i of the APM, providing: "After the final administrative decision has been communicated to the candidate, the candidate shall have the right, upon written request, to receive from the Chancellor, or other designated administrative officer, a written statement of the reasons for that decision . . . ." Generally, courts will not consider procedural issues that could have been raised before the administrative agency, but were not. (See, e.g., *Salyer v. County of Los Angeles* (1974) 42 Cal.App.3d 866, 872 ["At no time before or at the commission hearing did petitioner object that the notice provided by the letter was inadequate, and even assuming that the 'reasons' given in the letter were inadequately detailed, petitioner cannot complain now"].) Additionally, plaintiff did not raise the statement-of-reasons issue in his pleadings, his briefs, or his arguments in the superior court. "A cardinal principle of appellate procedure is that contentions not raised in the trial court may generally not be raised for the first time on appeal." (*Fleming v. Safeco Ins. Co.* (1984) 160 Cal.App.3d 31, 43.)

Judgment on the Age Discrimination Complaint

After denying the writ petition, the court concluded, "The determination of the administrative hearing being adverse to Plaintiff, it serves as a res judicata/collateral

estoppel bar to his civil action [for age discrimination] and Defendant is, therefore, entitled to judgment on the entire action." The court was correct. Plaintiff, having failed to overturn the agency's discrimination finding in his writ proceeding, was not entitled to proceed with an action for damages.

As stated in *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 76, "We conclude that when, as here, a public employee pursues administrative civil service remedies, receives an adverse finding, and *fails to have the finding set aside through judicial review procedures*, the adverse finding is binding on discrimination claims under the FEHA." (Italics added; see also *Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1091, alluding to *Johnson* and noting "an adverse quasi-judicial finding . . . is binding on subsequent discrimination claims under the FEHA unless set aside through a timely mandamus petition.")[6] Here, the no-discrimination finding was not set aside at the writ proceeding; rather, it was affirmed when the court denied the writ petition.

Plaintiff protests the age discrimination claim was never the subject of "a proper review" in the university proceedings. The argument is without merit. The record leaves no doubt plaintiff presented the issue at his grievance, the hearing board considered Killackey's remark in its deliberations, and it found no proof of age discrimination. During colloquy between Killackey and plaintiff at the formal hearing, when Killackey made his comment about tenure bringing into play the expectation of 10 or 20 years of academic contributions, plaintiff responded with the accusation, "So it's an age discrimination." The claim was a part of plaintiff's closing argument submitted to P&T, in which he said, "These new issues, introduced at the hearing [by Killackey's comment], raised strong suspicions of age discrimination in my review." He further stated, "[Killackey's] statement strongly raises the possibility that my *age* was a factor in

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[6] Plaintiff's request that we take judicial notice of the *Schifando* decision is superfluous and is therefore denied.

the decision by [defendant] not to appoint me. . . . Using age-related criteria for making appointments violates Federal guidelines for employment." (Italics added.) And when the hearing board issued its no discrimination finding, plaintiff did not object that the issue was not properly before the board. Indeed, under section 335.B.2 of the APM, P&T has the power to address *any* allegation that a tenure decision "was reached on the basis of impermissible criteria," including discrimination not limited to the specified categories. Invoking that basis for his grievance, plaintiff alleged discrimination. Thus, it cannot be gainsaid plaintiff's age discrimination claim was adjudicated before the hearing board and found to be without merit.[7] As a matter of law, that determination became final and binding when plaintiff failed to have it set aside.

Plaintiff's Motion to Augment the Record

Plaintiff filed a motion seeking to augment the record with the transcript of and exhibits to a deposition taken after defendant made its final decision denying plaintiff's tenure application. Defendant opposed the motion. We advised the parties the issue would be decided in conjunction with the appeal. We now deny the motion.

Under California Rules of Court, rule 12(a)(1), the reviewing court, on its own motion or that of a party, may order the record augmented with "(A) any document filed or lodged in the case in superior court; or [¶] (B) a certified transcript — or agreed

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[7] The nondiscrimination finding certainly passes muster. The *sole* evidence even arguably subject to interpretation as suggesting age discrimination is Killackey's comment regarding the university's expectation that in-line professors will provide many years of service. This is nothing more than a "stray remark," insufficient to establish plaintiff's claim. (See, e.g., *Merrick v. Farmers Ins. Group* (9th Cir. 1990) 892 F.2d 1434, 1438-439, and *Gibbs v. Consolidated Services* (2003) 111 Cal.App.4th 797, 801.) Moreover, the hearing board interpreted Killackey's ambiguous remark as indicating only that, regardless of the age of the applicant, the university "may properly show greater caution in assessing appointments" that require the *university* to make a 15 to 20 year commitment. That reasonable interpretation provides substantial evidence for the hearing board's no-discrimination finding.

or settled statement — of oral proceedings not designated under rule 4." Plaintiff admits the material was never filed or lodged with the superior court, but argues it fits within the "certified transcript" category. It does not. Section (B) refers to transcripts of oral proceedings *in the court*, for example, transcripts of hearings that may have been omitted inadvertently from the designation of reporter's transcript. The deposition transcript thus is outside the scope of the rule and cannot be considered by this court. (See, e.g., *Rollins v. City and County of San Francisco* (1974) 37 Cal.App.3d 145, 147-148.)

DISPOSITION

Plaintiff's request for judicial notice is denied. Plaintiff's motion to augment the record is denied. The order denying the writ petition is affirmed. The judgment is affirmed. Defendant shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.